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No. 97-1838

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

NORTHEAST CELLULAR TELEPHONE COMPANY, L.P.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER

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The Petition presents two profound questions implicating the independence of the Judicial Branch against *post hoc* interference by the Legislative Branch. The FCC has essentially taken the position that the Judicial Branch—far from being a coequal branch of the federal government, as contemplated by the Framers—is actually quite subordinate to the political branches. This is so because, on the FCC's view, the power of the federal courts to decide the cases before them is subject always, save only in constitutional cases, to a congressional power to revise those judgments (and the processes that produced them) by later statute. The Court should grant certiorari to address these questions and their serious ramifications for the Judicial Branch.

1. For all its bold assertions as to Congress's self-proclaimed power essentially to sit as a supreme court of errors in statutory cases, the FCC's first tack is to paper over the obvious importance of the issues presented and the ramifications of the holding below for the federal court system as a whole rather than defend its crabbed view of judicial authority. The FCC asserts (Opp. 8) that this case "does not raise any issue of general importance." The Department of Justice was more forthright in the court below, where it opened the brief *amicus curiae* of the United States with the assertion that "[t]his case presents an important question concerning the interpretation and application of the Paperwork Reduction Act of 1980 ('PRA'), 44 U.S.C. [§] 3501 *et seq.*"[1]

The government's representation from the court below, not the FCC's convenient assertion in this Court, is correct. Simply put, the extreme position taken by the government in this case, and endorsed by the court below, strikes at the very heart of the judicial function under Article III. It has long been clear that this Court's function is "to say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). This function encompasses "the power, not merely to rule on cases, but to

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[1] Brief of the United States, *Amicus Curiae*, at 1, *Saco River Cellular, Inc.* v. *FCC*, D.C. Cir. No. 91-1248 (filed July 1997).

decide them," *i.e.*, to " 'render *dispositive* judgments.' " *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995) (emphasis added).

It was this core judicial power that the D.C. Circuit exercised in 1990 when it reversed the FCC's "outrageous" decision and ordered that "the FCC *must* disqualify Port Cell's application" absent certain specified record evidence that all agree did not exist (Pet. 5-6). *Northeast Cellular Tel. Co.* v. *FCC*, 897 F.2d 1164, 1167 (D.C. Cir. 1990) (emphasis added). If Congress can set aside such an unequivocal ruling instructing an agency on how it must proceed, it is clear that *any* ruling on a nonconstitutional matter can be brushed aside by Congress in the very litigation in which it was rendered, a sweeping result that, both tellingly and astonishingly, neither the FCC nor PortCell disclaims. Obviously, a ruling that gives Congress the power to render decisions by this Court and all other courts advisory through later legislation—and, in so doing, to turn prevailing parties in litigation into losers—presents an issue worthy of this Court's review.

Unable to deny the effect of the ruling below, the FCC is left to argue that this is a "unique case arising under the Paperwork Reduction Act that is unlikely to recur." Opp. 8. The fact is, however, that the issues presented transcend the PRA and do recur with regularity. They can arise under *any* statute, and in *any* area of law.[2] It would

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[2] For example, courts have considered the effect of subsequent legislation on prior judgments in cases involving the securities laws (*Plaut, supra*), the federal carjacking statute (*United States* v. *Vazquez-Rivera*, 135 F.3d 172 (1st Cir. 1998)), prison litigation under 42 U.S.C. § 1983 (*e.g.*, *Hadix* v. *Johnson*, 133 F.3d 940 (6th Cir. 1998)), and the immigration laws (*Elramly* v. *INS*, 131 F.3d 1284 (9th Cir. 1997) (per curiam)). Similarly, Congress has fundamentally changed procedures applied in pending cases prior to enactment of the new statute in suits under the habeas corpus statute (*e.g.*, *Lindh* v. *Murphy*, 117 S. Ct. 2059 (1997)), Title VII (*e.g.*, *Landgraf* v. *USI Film Prods.*, 511 U.S. 244 (1994)), section 1983 (*e.g.*, *Garcia* v. *Silbert*, 141 F.3d 1415 (10th Cir. 1998)), and immigration statutes (*Reyes-Hernandez* v. *INS*, 89 F.3d 490 (7th Cir. 1996)). Of course, if this Court tolerates the leg-

therefore be a mistake for the Court to decline the opportunity to provide necessary guidance on these issues simply because this case involves the PRA.[3]

2. *Separation of Powers.* When it finally comes to terms with the court of appeals' reasoning on the separation of powers issue, the FCC offers a smattering of arguments not raised below, tellingly relegating the sole ground for decision offered to and adopted by the court of appeals—lack of finality—almost to an afterthought. In doing so, the FCC overlooks the fact that "[w]hile it is true that a respondent may defend a judgment on alternative grounds, we generally do not address arguments that were not the basis for the decision below." *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 n.5 (1996). In any event, those arguments are unavailing.

a. The FCC asserts (Opp. 9) that *Plaut* is inapplicable here because the relief granted was "essentially prospective." This assertion is irrelevant because only one

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islative incursion here on the judicial power, there is every reason to expect Congress to intervene in adjudicated cases more often on behalf of politically powerful parties such as NYNEX and PortCell. *See The Federalist No. 48*, at 333 (James Madison) (Isaac Kramnick ed. 1987) (noting the legislative tendency to "extend[] the sphere of its activity, . . . drawing all power into its impetuous vortex").

[3] Incredibly, respondents suggest that it would be pointless to grant certiorari here because of what the FCC vaguely describes as an "unresolved issue of petitioner's own qualifications" for the Portland license (Opp. 8). This case, however, involves only the legality of the retroactive reinstatement and grant of *PortCell's* application, which does not depend on any issue regarding Northeast. In any event, respondents fail to acknowledge that the FCC squarely *rejected* PortCell's argument on that isue when it awarded the license to Northeast. *See Portland Cellular Partnership*, 8 FCC Rcd. 4146, 4152 (1993) (finding "Port Cell's allegations . . . to be unsupported," so much so as to fail to state even "a prima facie case" that would justify an evidentiary hearing on the matter); *see also id.* at 4152 n.24 (deeming steps taken by Northeast's majority partner "sufficient . . . to demonstrate his control"); *contra* PortCell Opp. 16. The FCC's ruling was unquestionably correct, respondents' speculation to the contrary notwithstanding.

type of final judgment of an Article III court is categorically subject to any degree of subsequent statutory revision, and that is an injunction. See *Plaut*, 514 U.S. at 232; *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1856). This is so because injunctions—unlike other court decisions—by their very nature operate *in futuro*, imposing a "continuing" obligation that a party take (or refrain from taking) certain action, *id.*; therefore, to the extent a later-enacted statute alters "the prospective effect of injunctions," it does not operate retroactively. *Plaut*, 514 U.S. at 232. This case, of course, does not involve any injunction at all, but rather an appellate ruling setting aside an erroneous decision rendered by a lower tribunal. Such rulings are indeed subject to *Plaut*. See, *e.g.*, *United States* v. *Vazquez-Rivera*, 135 F.3d 172, 177 (1st Cir. 1998); *Elramly* v. *INS*, 131 F.3d 1284, 1285 (9th Cir. 1997) (per curiam); but see Pet. App. 13a.[4]

The FCC asserts (Opp. 9-10) that "[t]he same principle [underlying the injunction exception] applies to licensing proceedings." That sweeping assertion, however, is remarkable for its utter lack of support. If the FCC believes a new exception to *Plaut* is warranted, that is a reason to grant, not deny, certiorari here.

In addition, the FCC's contention that the relief ordered in this case is "entirely prospective" (Opp. 10) is wrong. The FCC did not merely order that henceforth PortCell, rather than Northeast, shall be the licensee for Portland, Maine. To the contrary, the FCC, in 1996, "rescind[ed] the [1993] grant of the application of North-

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[4] The FCC distinguishes *Vazquez-Rivera* as "rest[ing] squarely on the Ex Post Facto Clause" (Opp. 14). Later, however, the FCC is constrained to admit (Opp. 14 n.3) that the court relied on *Plaut* in rejecting the argument that the new sentencing provision did not violate the Clause because the amendment merely "clarifi[ed]" the intent underlying the original provision. The FCC's claim that there is no "conflict in reasoning" between the two decisions is misleading because the conflict is in the *holding*: *Vazquez-Rivera* held that an appellate decision that includes a remand can be "final" under *Plaut* (135 F.3d at 177), whereas the court below held that such a decision can never be final. Pet. App. 11a.

east" and "reinstate[d] *nunc pro tunc* and grant[ed] the application of Port[Cell]." Pet. App. 24a. This *nunc pro tunc* order means that the FCC, in addition to stripping Northeast of its right to continue holding its license in the future, took away Northeast's right to hold the license in the past, *i.e.*, from 1993 to 1996, which proves that the relief ordered does indeed have a major retroactive component. See *Black's Law Dictionary* 1069 (6th ed. 1990) (defining "*nunc pro tunc*" as "[a] phrase applied to acts allowed to be done after the time when they should be done, *with a retroactive effect, i.e.*, with the same effect as if regularly done") (emphasis added).

b. The FCC contends (Opp. 10) that even if *Plaut* were applicable, section 3512(b) "had nothing to do with" (and thus could not nullify) the *Northeast* decision. This assertion defies reality. Noting that "[t]here is no question here that Port Cell has failed to comply strictly with [the FCC's financial commitment] regulations" (897 F.2d at 1166), the *Northeast* court ruled that "the FCC *must* disqualify PortCell's application" absent specified record evidence justifying a valid waiver of the regulations. *Id.* at 1167 (emphasis added). Although respondents ignore that penultimate holding, perhaps in the hope that the Court will overlook it at the certiorari stage, they cannot make it go away. With the enactment of section 3512(b) in 1995, however, Congress plainly countermanded that judicial instruction with a statutory instruction, in effect, that despite *Northeast* the FCC need not—indeed, *must not*—disqualify PortCell's application. Thus, the court's instruction was indeed nullified by section 3512(b), as even the FCC concluded in 1994.[5] See *Portland Cellular Partnership*, 9 FCC Rcd. 3291, 3292 & n.3 (1994).

[5] For this reason, it is beside the point that *Northeast* "did not decide any question regarding the application of the [PRA]" (Opp. 10). As *Plaut* noted, federal courts do not simply answer legal questions presented to them in a particular case—they also *dispose of* the case. 514 U.S. at 218-19. As previously shown, the court of appeals' disposition in 1990 left open only one basis for salvaging

c. When the FCC finally gets around to defending the rationale of the court of appeals, it states (Opp. 10) that the *Northeast* decision necessarily was not final because "it remanded the case to the Commission." To its credit, the FCC does not adopt PortCell's demonstrably false claim (Pet. 18-19) that *Plaut* failed to define what constitutes a "final judgment" (PortCell Opp. 6); instead, the FCC correctly acknowledges (Opp. 13) that *Plaut* adopted the definition of finality from *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), which regards a lower court judgment as "final" when all appeals on direct review are foregone or completed. *Id.* at 321 n.6; see also *Plaut*, 514 U.S. at 227. Even though that line was plainly crossed in 1990 when the time for seeking certiorari from *Northeast* expired, the FCC somehow finds it "implicit[]" in that definition that a remand is not " 'final[]' in the relevant sense" (Opp. 14). This reflects mere wishful thinking on the FCC's part, which explains why it does not justify that assertion.[6]

PortCell's application. That disposition commands the protection of Article III as much as the legal analysis that led to it, which Congress itself recognized in requiring the FCC to give controlling effect to decisions such as *Northeast*. *See* 47 U.S.C. § 402(h), (j). Moreover, respondents' efforts to carve PortCell's PRA claim from the preclusive scope of the *Northeast* decision ignore the obvious fact (Pet. 20) that judicial judgments have *res judicata* effect and therefore bar not only claims that were actually decided, but also any and all claims that could have been presented for decision.

[6] Instead, the FCC (like PortCell, Opp. 6) purports to derive from *Ford Motor Co.* v. *NLRB*, 305 U.S. 364, 374 (1939), a categorical rule that a judgment that includes a remand is never final (Opp. 11). Clearly, however, *Ford* announced no such rule, but rather stated that the "familiar appellate practice to remand causes for further proceedings without deciding the merits . . . does not encroach upon administrative functions." 305 U.S. at 373-74. This statement is inapposite because *Ford* did not consider whether remand decisions can be considered "final" and because *Northeast* obviously did not remand "without deciding the merits," *id.* Although the FCC mistakenly focuses on "the question of which party must be awarded the cellular license" (Opp. 13), the relevant issue resolved by *Northeast* was whether *PortCell* could be awarded

Likewise unavailing is respondents' argument (Opp. 11-12; PortCell Opp. 6) that a lower court decision can never be final under *Plaut* as long as it is possible for a higher court, in proceedings other than on direct review, to revisit the holding. On respondents' exceedingly narrow view of the judicial power, *Plaut* would be a dead letter because it is *always* possible for a court decision—even a decision of this Court—to be reconsidered in collateral proceedings. See, *e.g.*, *Agostini* v. *Felton*, 117 S. Ct. 1997 (1997) (overruling, on motion to vacate judgment, Supreme Court ruling rendered twelve years earlier in the same case between the same parties). Not surprisingly, therefore, this Court has *rejected* the notion that its ability to grant certiorari in a later collateral proceeding denies finality to a ruling by a court of appeals in an earlier administrative agency appeal. See *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 341 (1958) (holding, in collateral proceeding challenging agency action upheld in prior review proceeding, that "the judgment of the Court of Appeals [affirming the agency order], upon this Court's denial of the [challenger's] petition for certiorari, became final").

Lastly, citing *City of Tacoma*, the FCC argues (Opp. 12-13) that although under *Plaut* "[f]inality of a legal judgment is determined by statute" (514 U.S. at 227), the court below properly disregarded 47 U.S.C. § 402(j), which states that appeals court rulings reversing and remanding FCC orders "shall be final" unless reversed on appeal by the Supreme Court. *Id.* *City of Tacoma* actually refutes the FCC's position, however. The case held that where, as here, a statute denominates an appeals court ruling as "final" subject to Supreme Court review, the ruling becomes final (and assumes *res judicata* effect) when it is not reviewed on direct appeal by this Court. 357 U.S. at 336-37, 341.

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the license absent a valid waiver of the financial qualifications requirement; the court ruled that it could not.

3. *Retroactivity*. As with the Article III issue, respondents defend the rationale of the court below on retroactivity only as a last resort, offering instead alternative grounds of decision. These arguments are unavailing.

a. PortCell argues that section 3512(b) was properly applied retroactively because "[t]here is no language even arguably excluding [its application to] pending cases" (PortCell Opp. 11). This argument is plainly wrong because *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), erects a presumption *against* retroactive application of statutes. PortCell's argument would turn *Landgraf* on its head by creating a presumption *favoring* retroactivity, which, as this Court has held, has no basis in law. *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 117 S. Ct. 1871, 1878 (1997).

The FCC, for its part, contends (Opp. 15-16) that the text of section 3512(b) clearly requires retroactive application. This argument, too, is incorrect. The FCC simply ignores Northeast's showing (Pet. 22-23) that the text does not at all address whether section 3512(b) applies to cases pending prior to its enactment, and thus does not remotely satisfy *Landgraf*'s "clear-statement rule." See *Lindh* v. *Murphy*, 117 S. Ct. 2059, 2062 (1997). As *Lindh* held, the presumption against retroactivity can be trumped only by "statutory language . . . so clear that it c[an] sustain only one interpretation," *i.e.*, that it must be applied to pending cases. *Id.* at 2064 n.4. The text of section 3512(b) falls considerably short of that level of clarity, as the FCC itself conceded in its order. See Pet. App. 33a (concluding that "the statute itself does not explicitly address this question").

b. Respondents consequently are forced to fall back on snippets derived from the legislative history of section 3512(b) for the support missing from the text for retroactive application of the statute (Opp. 16; PortCell Opp. 9-12). The FCC asserts (Opp. 16) that legislative history is "relevant" in applying the presumption against retroactivity. The FCC, however, does not explain how

that could possibly be given that the presumption interposes a "clear-statement rule" (*Lindh*, 117 S. Ct. at 2062) rebuttable only by clear "statutory language." *Id.* at 2064 n.4; see also, *e.g.*, *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (ruling that retroactive application of statutes is barred "unless *their language* requires this result") (emphasis added). The FCC also fails to explain how allowing legislative history—especially fleeting (and likely scripted) exchanges on the floor of a single house of Congress by a couple of Members, such as those cited by respondents—to provide the requisite authorization for retroactivity comports with the purpose of the presumption, which is to "ensure that *Congress itself* has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Landgraf*, 511 U.S. at 268 (emphasis added).[7]

Nevertheless, although unacknowledged by respondents, the fact is that the Circuits are very much divided on the question whether legislative history can be used to rebut the presumption against retroactivity. See generally *Hunter* v. *United States*, 101 F.3d 1565, 1569 (11th Cir. 1996) (citing cases constituting "conflict among the circuits, and even within some circuits, about whether *Landgraf*'s first step [*i.e.*, unambiguous congressional intent] can be satisfied by evidence of legislative intent other than in an express statutory command"). The court should grant certiorari here to resolve this acknowledged split.[8]

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[7] Contrary to the FCC (Opp. 16), there is a fundamental difference between citing legislative history as a basis for *adhering* to the presumption (which *Landgraf* did, *see* 514 U.S. at 262-63) and citing legislative history as a basis for *rebutting* the presumption (which this Court has *never* done). *See Lindh* v. *Murphy*, 117 S. Ct. 2059, 2064 n.4 (1997) ("[C]ases where this Court has found truly 'retroactive' effect adequately authorized by a statute have involved statutory language that was so clear that it could sustain only one interpretation.").

[8] The FCC's reliance (Opp. 18) upon *Landgraf*'s reference to "commonsense" (511 U.S. at 275 n.29) is misplaced. That statement simply reflects the intuitive correctness of the rule that new procedural rules are presumptively not to be applied in cases where

c. Importantly, respondents limit themselves to erroneous merits arguments without addressing Northeast's arguments as to the importance of providing further guidance on the *Landgraf* issue. Specifically, respondents do not deny Northeast's showing (Pet. 23-25) that the Circuits are sharply divided on the proper analysis under *Landgraf* of procedural changes. Additionally, the FCC's "doubt[s]" as to whether *Landgraf* applies "to procedural changes in administrative [as opposed to judicial] proceedings" (Opp. 18 n.4) simply provide yet another reason for the Court to hear this important case.

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The petition for writ of certiorari should be granted.

Respectfully submitted,

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old procedures have already been applied. That is so because once that point in a particular proceeding has been reached, the parties *do* have "reliance interests in matters of procedure," and any attempt thereafter to apply a new and different procedural rule would be subject to the presumption against retroactivity. *Id.* at 275 & n.29. This is particularly so where, as here, the new procedural rule revives a claim that was previously dead in the particular litigation, as PortCell's twice-rejected PRA claim was here prior to 1995. *See Hughes Aircraft*, 117 S. Ct. at 1878 (holding that new statute lifting procedural obstacle that "completely barred" a claim is impermissibly retroactive).